CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 288.

CITIZENS BANKING COMPANY

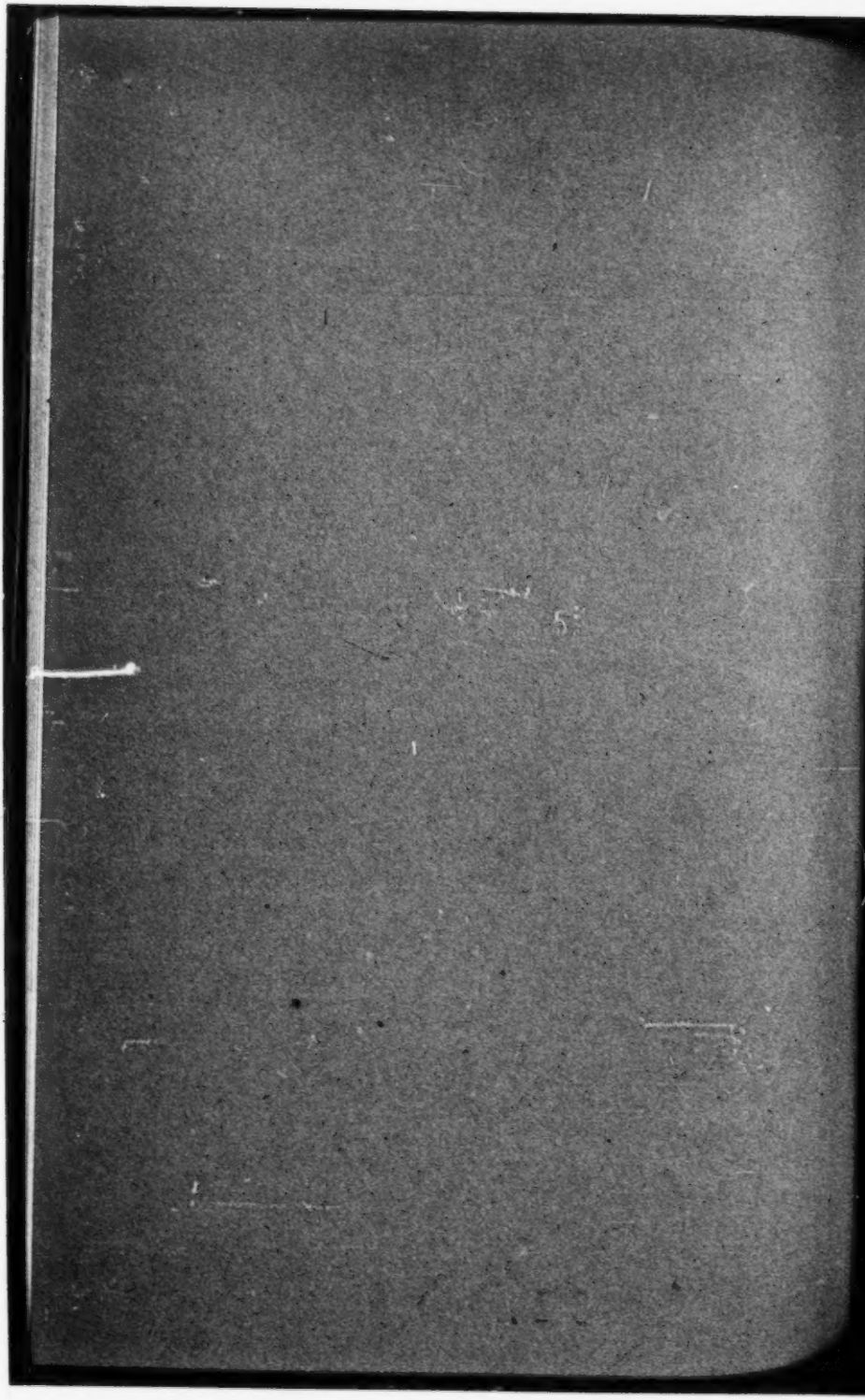
vs.

AVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

N A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 28, 1912.

(23,269)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1914.

1 United States Circuit Court of Appeals, Sixth Circuit.

No. 2193.

CITIZENS' BANKING COMPANY, Appellant,
vs.
RAVENNA NATIONAL BANK OF RAVENNA, OHIO, and CORA M. CURTIS, Appellees.

On the hearing of this cause, questions arose for the proper decision of which this court desires the instruction of the Supreme Court. The facts upon which the questions arise are as follows:

August 10, 1908, the Ravenna National Bank filed, in the United States District Court for the Northern District of Ohio, its petition in bankruptcy against Cora M. Curtis. The petition included every allegation necessary to require an adjudication of bankruptcy, unless upon the point whether the defendant had committed an act of bankruptcy; and upon this subject, its sole allegation was as follows:

"That the said Cora M. Curtis is insolvent, and that within four months next preceding the date of this petition, she committed the following acts of bankruptcy, to-wit:

(*a*) On April 9, 1908, the respondent suffered and permitted the Citizens' Bank of Norwalk, Ohio, to recover a judgment against her for $1,598.78 and costs, by the consideration of the Common Pleas Court of Erie County, Ohio; that on April 9, 1908, execution was issued and levied on the real estate owned by respondent, in Norwalk, Ohio; that subsequently, said execution was levied on the real estate of respondent in Toledo, Ohio.

2 (*b*) That on or subsequent to April 9, 1908, the respondent suffered and permitted the First National Bank of Fremont, Ohio, to recover a judgment against her for $3,034.66 and costs, by the consideration of the same court; that on April 11, 1908, an execution was issued thereon and levied on the real property of respondent which was situated in Norwalk, Ohio; that shortly thereafter an execution on said judgment was levied on the real property of respondent which is situated in Toledo, Ohio.

(*c*) That the said respondent suffered the Huron Banking Company, of Norwalk, Ohio, to recover a judgment against her for $3,678.12, and costs, by the consideration of the same court, said judgment having been rendered subsequent to April 9, 1908; that on April 16, 1908, an execution on said judgment was duly issued and levied on the real estate of respondent.

That by the acts of bankruptcy aforesaid, the respondent suffered and permitted the three judgment creditors above mentioned to obtain preferences; that respondent has not, at any time, vacated or discharged said preferences or any part thereof."

To this petition respondent demurred, but later withdrew her demurrer and filed an answer, admitting that she was insolvent at the time of filing the petition and stating her willingness to be adjudged

a bankrupt "on the grounds mentioned in the petition herein as well as on the ground afforded by this answer." While her demurrer was pending, the First National Bank of Fremont, one of the alleged preferred creditors, filed its paper saying that it

"herewith excepts and demurs to the petition filed, herein, for the reason that the same is wholly insufficient in law, and that the same discloses no act of bankruptcy committed by the said respondent."

During the same time, the Citizens' Banking Company, another alleged preferred creditor, being in default, tendered, for filing, its answer, in which it alleged the rendition of its judgment as stated in the petition, and that the judgment was in full force and wholly unsatisfied, and denied that the respondent, Cora M. Curtis, had committed any act of bankruptcy and averred that the petition disclosed no act of bankruptcy committed by the respondent.

3 No other interested person appearing, the matter came on to be heard on the pleadings, and the District Court, being of opinion that the petition alleged an act of bankruptcy not denied by the answer tendered, overruled the demurrer, refused to permit the answer to be filed, and made the usual order of adjudication in bankruptcy. From this order the First National Bank of Fremont and the Citizens Banking Company appealed to the Circuit Court of Appeals.

Upon the facts above set forth, the questions of law concerning which this Court desires the instructions of the Supreme Court are as follows:

1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by such levy, under the provisions of Sec. 3*a* (3) of the Bankruptcy Act of 1898.

2. Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate.

In accordance with the provisions of Sec. 239 of the Judicial Code, the foregoing questions of law are, by the Circuit Court of Appeals of the United States, Sixth Circuit, hereby certified to the Supreme Court.

J. W. WARRINGTON,
Circuit Judge;
LOYAL E. KNAPPEN,
Circuit Judge;
ARTHUR C. DENISON,
Judges of the Circuit Court of Appeals,
Sitting in this Cause.

[Endorsed:] No. 2193. United States Circuit Court of Appeals, Sixth Circuit. Citizens' Banking Company, Appellant, vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis, Appellees. Certificate to the Supreme Court. Filed Jun- 4, 1912. Frank O. Loveland, Clerk. Recorded—Journal D—295, 296.

4 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Citizens Banking Company, Appellant vs. Ravenna National Bank, et al., Appellees, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of June A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States Circuit Court of Appeals for the Sixth Circuit. Citizens' Banking Company, Appellant, vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis, Appellees. Questions Certified to the Supreme Court of the United States.

Endorsed on cover: File No. 23,269. U. S. Circuit Court Appeals, 6th Circuit. Term No. 288. Citizens' Banking Company vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis. (Certificate.) Filed June 28, 1912. File No. 23,269.

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IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

BRIEF AND ARGUMENT ON BEHALF OF CITIZENS BANKING COMPANY.

G. RAY CRAIG,
EDWARD H. RHOADES, JR. AND
JOHN D. RHOADES,
Attorneys for Citizens Banking Company.

THE TOLEDO BRIEF & RECORD COMPANY,
PRINTERS.

IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

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RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

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JOHN D. RHOADES,
Attorneys for Citizens Banking Company.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

BRIEF AND AGUMENT ON BEHALF OF CITIZENS BANKING COMPANY.

STATEMENT OF CASE.

This case is in this court upon a certificate from the United States Circuit Court of Appeals for the sixth circuit.

August 10th, 1908, The Ravenna National Bank filed in the United States District Court for the Northern District of Ohio its petition in bankruptcy against Cora M. Curtis.

The petition included every allegation necessary to require an adjudication of bankruptcy, unless upon the point whether the defendant had committed an act of bankruptcy; and upon this subject its sole allegation was as follows:

"That the said Cora M. Curtiss is insolvent, and that within four months next preceding the date of this petition, she committed the following acts of bankruptcy, towit:

(*a*) On April 9, 1908, the respondent suffered and permitted the Citizens' Bank of Norwalk, Ohio, to recover a judgment against her for $1,598.78 and costs, by the consideration of the Common Pleas Court of Erie County, Ohio; that on April 9, 1908, execution was issued and levied on the real estate owned by respondent, in Norwalk, Ohio; that subsequently, said execution was levied on the real estate of respondent in Toledo, Ohio.

(*b*) That on or subsequent to April 9, 1908, the respondent suffered and permitted the First National Bank of Fremont, Ohio, to recover a judgment against her for $3,034.66 and costs, by the consideration of the same court; that on April 11, 1908, an execution was issued thereon and levied on the real property of respondent which was situated in Norwalk, Ohio; that shortly thereafter an execution on said judgment was levied on the real property of respondent which is situated in Toledo, Ohio.

(*c*) That the said respondent suffered the Huron Banking Company, of Norwalk, Ohio, to recover a judgment against her for $3,678.12, and costs, by the consideration of the same court, said judgment having been rendered subsequent to April 9, 1908; that on April 16, 1908, an execution on said judgment was duly issued and levied on the real estate of respondent.

That by the acts of bankruptcy aforesaid, the respondent suffered and permitted the three judgment creditors above mentioned to obtain preferences; that respondent has not, at any time, vacated or discharged said preferences or any part thereof."

(Transcript, page 1.)

Two of the judgment creditors, the First National Bank of Fremont, and the Citizens Banking Company, opposed the granting of the petition, the one by demurrer—the other by tendering for filing its answer, averring that the petition disclosed no act of bankruptcy committed by the respondent. (Transcript, page 2.)

The questions of law concerning which, the instructions of this court are asked, are as follows (Transcript, page 2):

> "1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by such levy, under the provisions of Sec. 3a (3) of the Bankruptcy Act of 1898.
>
> 2. Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

That part of Section 3a (3) of the Bankruptcy Act of 1898, which is pertinent to the questions certified, is as follows:

> "Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

ARGUMENT.

I.

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition of the property" affected by such levy, within the provisions of the above section of the Bankruptcy Act.

The Bankruptcy Act contains no definition of the term "final disposition" or the words "final" or "disposition." They have, however, a fixed legal signification.

The word "final" is defined in Bouvier's Law Dictionary (Ed. 1897) as follows:

"last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory, in respect to the pendency of suits."

The Standard Dictionary defines "final" as follows:

"of, pertaining to or coming at, or as the end or conclusion; ultimate; last."

The word "dispose" means to alienate, to divest the ownership of. It includes barter, exchange or partition.

Anderson's Dictionary of Law, p. 365.

This same word "dispose" means to effectually transfer: to exchange for other property; to get rid of; to give; to part with; to part with the right to, or ownership of, property, in other words, a change of property; to relinquish; to sell; to sell at auction; to sell for cash or on time; to transfer to any person or to put into the hands of another. The term imports finality.

14 Cyc., pp. 516, 517.

The phrase "final disposition" has been judicially determined in several cases, as follows:

"The phrase 'final disposition of the case,' in 19 Stat., 102, allowing an application for discharge in bankruptcy, where there are no assets, 'at any time after the expiration of 60 days, and before the final disposition of the cause,' means the settlement of the estate and the discharge of the assignee or trustee."

In re Heller (U. S.), 9 Fed., 373.

"It means the final disposition of the administration of the estate."

In re Brightman (U. S.), 4 Fed. Cas., 136, 137.

"The final disposition of a matter submitted to arbitration is a determination so that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform

or pay it without any further ascertainment of rights or duties."

Colcord vs. Fletcher, 50 Me., 398, 401.

"The expression 'final disposition,' as used in Act June 25, 1868, 2, allowing the court of claims at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the final disposition of any such suit or claim, on motion on behalf of the United States to grant a new trial in any such suit or claim means the final determination of the suit on appeal, if an appeal is taken, or, if none is taken, then its final determination in the court of claims."

Ex parte Russell, 80 U. S. (13 Wall.), 664, 667, 20 L. Ed., 632.

The last three authorities are cited in Vol. 3 "Words & Phrases Judicially Defined."

Bearing in mind the signification of these words, what does the term "final disposition" mean as it is found in Section 3a (3) of the Bankruptcy Act?

The "final disposition" of the property referred to in Sec. 3a (3) of the Bankruptcy Act evidently means a final disposition of the property arising out of and resulting from the *legal proceedings*.

By a sale of property under legal proceedings the title to the property is forever taken from the former owner; likewise the possession, enjoyment and control of the property is forever lost to him. He no longer has any interest in the property or right to the use thereof, and it was manifestly the object of the Bankruptcy Act to provide that this act of bankruptcy should not be complete by merely allowing a creditor to obtain a preference, but should only be complete when the property upon which the creditor obtained the preference was about to be (within five days) forever taken from the debtor by "sale" or "final disposition," with the result that the debtor would thereafter be powerless to dis-

charge the preference because the property had forever passed from his possession and control.

The words "final disposition" used in connection with the word "sale" evidently are intended to cover every alienation of the property of the debtor through legal proceedings, which would take the property from the debtor as completely and as finally as would a sale. For instance, we suggest that an action in replevin by which a debtor's property might be forever taken from him and he be forever barred of the title, use, enjoyment and control thereof would be such a "final disposition." Likewise, a final disposition of real property might be effected through legal proceedings by an action in ejectment, or, in certain cases, by an action to quiet title.

In all these cases, sale, action in replevin, ejectment or to quiet title, the result of the sale or the final disposition, under these actions, would be to take forever from the debtor the property itself, his title thereto, as well as his control thereof, and his right to use the same, and *forever place it beyond his power to discharge the preference thereon.*

Judgment liens upon real estate have none of these elements of finality. The title to the property affected remains, as before, in the judgment debtor. The right to the use, occupancy and control of the property remains in him. The right to lease, bargain, sell or mortgage the property, also, remains in him. The rents, issues and profits belong to the judgment debtor; the increment in value is his.

The property is his property, and he may, at any time, discharge the lien which the creditor has acquired thereon.

Furthermore, as pointed out by the Per Curiam opinion of the Circuit Court of Appeals in this present case, 202 Fed., 892:

> "The continued existence of the lien is uncertain as against the debtor, for the judgment may be set aside upon motion for a new trial or by a reviewing court. So, too, the section covers attachment liens as well as execution liens (*Metcalf vs. Barker,* 187 U. S., 165), and attachment liens are often, if not usually, subject

for a much longer period than four months, to defeasance by the ordinary incidents of procedure, as by a motion to dissolve, or by a failure by the plaintiff to recover judgment."

This is well illustrated by an examination of the Ohio statutes providing for the review and vacation of judgments. At the time the bankruptcy proceedings now before the court were instituted a judgment debtor in Ohio had four months from the date of the judgment within which to begin proceedings in error in the next higher court.

> "No proceedings to reverse, vacate or modify a judgment or final order shall be commenced unless within four months after the entry of the judgment or final order complained of; or in case the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, within four months exclusive of the time of such disability."
>
> General Code of Ohio, Sec. 12270, R. S. 6723.

It is further provided by Section 12265 of the General Code of Ohio, that

> "No proceeding to reverse, vacate, or modify a judgment or final order rendered in the probate, common pleas or circuit court, except as hereinafter provided, shall stay execution, unless the clerk of the court in which the record of such judgment or final order is made takes a bond executed on the part of the plaintiff in error to the adverse party, with sufficient surety as follows:"
>
> (Here follows a description of the bonds required in various classes of cases.)

It is provided by Section 11702 of the General Code:

> "If a judgment, in satisfaction of which lands or tenements are sold, be thereafter reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor, of the money for which such lands or tenements were sold, with lawful interest from the day of sale."

It will thus be seen that in the case of an actual sale there is a real "final disposition" of the property notwithstanding the judgment may be erroneous and subsequently reversed. Not so, however, if there has been no sale. In such event the lien of the judgment disappears with the reversal of the judgment and the property is right back where it was before the judgment was rendered and in fact where it had been continuously. In such circumstances to say that there had been a final disposition of the property because of the fact that the invalid judgment was not discovered to be invalid prior to four months less five days, would be we submit a most extraordinary abuse of the English language.

A similar and perhaps even more anomalous situation arises by reason of certain statutes which we believe are peculiar to Ohio. In this state there is a right to take an appeal from the court of common pleas to the circuit court (now called the court of appeals) in certain classes of cases, and upon an appeal being taken the case is tried *de novo* in the circuit court which in such cases becomes a trial court.

Section 12223 of the general code of Ohio provides:

> "The circuit court shall have jurisdiction of certain cases, as hereinafter provided, by appeal; and the trial therein shall be conducted in the same manner as in the common pleas court, and upon the same pleadings, unless amendments are permitted or ordered by the circuit court."

Section 12224 of the general code of Ohio provides:

> "In addition to the cases and matters specifically provided for, an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist, and from an interlocutory order made by the common pleas court, or a judge thereof, dissolving an injunction in a case of which it had original jurisdiction."

The effect of such appeal, however, is not to destroy the lien of the judgment rendered by the court of common pleas.

Section 12237 of the general code of Ohio provides:

> "When a party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated; but it shall be bound, in the same manner as if the appeal had not been taken, until the final determination of the cause in the circuit court."

It has, however, been held repeatedly by the supreme court of Ohio that the effect of the law is to suspend the execution of the judgment of the lower court until the appeal is disposed of by the circuit court.

See Jenney vs. Walker, 80 O. S., 100.

An appeal is ordinarily perfected by giving a bond within thirty days after the judgment or order is entered on the journal of the court. Section 12226, General Code of Ohio.

Where we have an appealable case in which an appeal is taken we may therefore have this situation. The judgment of the court of common pleas is a lien on the real estate and remains so notwithstanding the appeal but no sale can be had until the appeal is passed upon. More than four months may and usually does elapse between the entry of the judgment in the court of common pleas and the decision of the case upon appeal. If the theory as to the meaning of "final disposition" which we are combatting is upheld then notwithstanding an appeal may have been taken the property will be deemed to have been finally disposed of at the beginning of the five day period preceding the end of four months after the judgment and a petition in bankruptcy may be filed based upon such "final disposition" of the property as an act of bankruptcy, and the judgment debtor may be forced through bankruptcy, although the day after or the week after or a

month or six months after the bankruptcy petition is filed he may win his appeal, destroy the lien of the judgment of the lower court upon his real estate and again be entitled to the enjoyment of such real estate free from all claim of the former judgment creditor. We thus have what might be called a *temporary* "final disposition" of the property, or in other words, a "final disposition" which is not final and in fact is not a disposition.

Further along this same line, there are in Ohio as in most of the other states statutes which give persons against whom judgments are entered the right to relief from such judgment by appropriate proceedings even years after the judgment has been entered. Such is Section 11631 of the General Code of Ohio which provides among other things that judgments may be vacated after the term,

> "3. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order;
> "4. For fraud practiced by the successful party in obtaining a judgment or order;
> "5. For erroneous proceedings against an infant, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
> "6. For the death of one of the parties before the judgment in the action;
> "7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;
> "8. For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section eleven thousand six hundred and three;"

And under other circumstances prescribed in that and other sections of the statutes.

By availing himself of the opportunity given by such statutes as these a judgment debtor may obtain the vacation of a judgment and the setting aside of its lien years after four months from the date of the judgment. We submit that this demonstrates that the so-called "final disposition" of the

property five days before the lapse of such four months, is not a disposition of the property in any sense at all.

Furthermore it is provided by the General Code of the State of Ohio:

> "SEC. 11663. If execution on a judgment rendered in a court of record in this state, or a transcript of which has been filed as hereinbefore provided, be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued thereon and the time of suing out another execution, such judgment shall be dormant, and cease to operate as a lien on the estate of the judgment debtor. (R. S., Sec. 5380.)"
>
> "SEC. 11708. No judgment on which execution is not issued and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor. (R. S., Sec. 5415.)"

It is manifest from these provisions of the statutes that further affirmative action is required on the part of the judgment creditor not only to preserve the priority of the lien of his judgment upon the property of the debtor, but even to preserve the lien itself.

How can the mere obtaining of a judgment lien be considered a "final disposition" of the debtor's property as a result of legal proceedings, when the lien itself is subject to be divested upon a reversal of the judgment—when the lien itself is a mere temporary thing requiring further affirmative action on the part of the creditor to realize thereon, or even to keep it alive—when the title of the property remains in the judgment debtor and the right to the use, enjoyment and control thereof remains in the judgment debtor, and the right remains in him at any time to discharge the judgment lien?

The rendition of the judgments, the issue and levy of the executions, did not, in any legal sense, effect a "final disposition" of the property referred to in the petition.

The fact, that the adjective "final" is used, only makes it more apparent that it was the intention of the Congress that the phrase "final disposition" means such a disposition as takes with it an actual and complete transfer of the title to the property of which "final disposition" is made. In other words, it is just what the word "final" imports—a complete disposition of the property, so that the former owner thereof has no further dominion over it or rights to it.

Therefore, we respectfully submit that to *dispose* of property means to exercise finally one's power of control over it; to pass it over into the control of another; to part with it; and finally to get rid of it. And that the words "final disposition" as used by the Congress mean a disposition which is no less final than an actual sale of the property, and that the mere continued existence of a judgment lien upon real estate for a period of four months is no such "final disposition."

II.

An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

Two things are necessary in order to commit an act of bankruptcy under the subdivision under consideration.

1. The suffering or permitting of the preference through legal proceedings.

2. The failure to discharge such preference at least five days before a sale or final disposition of any property affected thereby.

No person can be adjudged a bankrupt for any act except those specifically enumerated in the bankruptcy statute. This has always been the rule under this act as well as the former acts of bankruptcy. This was clearly and positively pointed out by this court in *Wilson vs. City Bank of St. Paul.*

17 Wall. (U. S.), 473, wherein this court expressly refuses to enlarge the acts of bankruptcy enumerated in the statute (pp. 485-486).

> "The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.
>
> We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majorty of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.
>
> Many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act."

It is true as pointed out by this court in *Wilson vs. Nelson*, 183 U. S., 191, that the bankruptcy law of 1898 differs from that of 1867 in that the intent of the debtor is not now an essential fact in establishing this ground of bankruptcy, but as pointed out by the able opinion of Judge Rose *in re Truitt*, 203 Fed., 550-557, "Nothing which was said in the case of *Wilson Bros. vs. Nelson* in any way modifies the general rule of construction laid down in *Wilson vs. City Bank*

to the effect that, a proceeding in involuntary bankruptcy being against common right, all substantial doubts must be resolved in favor of the debtor."

So it is held *in re Empire Metallic Bedstead Company* decided by the Circuit Court of Appeals, Second Circuit:

> "A petition for the appointment of a receiver is not that proceeding which is universally recognized as an assignment, and its 'equivalency' of result, if equivalency exists, is not important."

The court go on to say:

> "The bankruptcy statute has said that the one is an act of bankruptcy, and has said nothing about the other, in direct terms; and when acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class. Why the Legislature did not specifically mention acts of corporations which would have the effect of a general assignment, but which are of a different character, it is unnecessary to surmise; for it is, in our opinion, sufficient to say that these other acts are not assignments, and were not particularly specified, and that, if they are acts of bankruptcy, it is because they are included in the general language of one of the other subdivisions of Section 3 of the act."
>
> In re Empire Metallic Bedstead Co., 98 Fed. Rep., 981. (See p. 982.)

> "The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien and the last day for doing this is five days before the day a sale of the property is advertised. In the case of a judgment, therefore, the petitioners must prove the entry of the judgment, the issue of an execution, the levy thereunder and the debtor's insolvency at the time of the judgment and levy. They must also prove that the property was actually sold at execution sale or that the sale was advertised for a day certain and that the debtor had permitted the levy to stand until the sale was but five days distant."

In re Rome Planing Mill, 96 Fed. Rep., 813. (See p. 815.)

"A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, 'suffers or permits' the creditor to obtain a preference, through legal proceedings, within the meaning of bankruptcy act July 1st, 1898, * * * * which, if he is insolvent, and unless he discharges the preference at least five days before the time for sale under the levy, constitutes an act of bankruptcy."

Bogen & Trummel vs. Protter, 129 Fed. Rep., 533.

The case last cited was decided on May 4, 1904.

Judgments were rendered against the bankrupt in October, and executions were issued thereon, and the judgment debtor's property was advertised to be sold on October 25th and October 27th. On October 24th the petition in involuntary bankruptcy was filed against him. It will be noted that this court held that, there being a sale of the judgment debtor's property actually advertised, the act of bankruptcy was thereby committed by him.

In the case at bar, there is no allegation or claim made in the petition that the sale of the bankrupt's property was advertised, or that any proceeding had been taken with reference to a sale thereof after the issuing and levying of the executions.

"Where an involuntary bankruptcy petition alleged that judgment had been obtained and executions levied against the bankrupt's property, but failed to state the further history of the executions, it did not state an act of bankruptcy, since it is only the debtor's failure within five days before a sale of his property levied on to have the execution vacated or discharged, and not the rendition of a judgment and the levying of execution, that constitutes an act of bankruptcy."

In re Vastebinder (District Court of Pa.), 126 Fed. Rep., 417.

In re Vastebinder, supra, Archbald, District Judge, made the following observation:

> "It is not the mere obtaining of a judgment and levying execution on the property of the debtor while insolvent that makes him liable as a bankrupt, but the failure on his part, within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged; and there is nothing of that kind alleged here. All that is stated is that judgments were obtained and executions levied, but what became of them is not shown. The vital point in the charge is thus left out, and as to this the demurrer is well taken."

(See page 420.)

In a case decided by the United States District Court of Connecticut, entitled *In re Windt,* 177 Fed. Rep., 584, on June 6, 1909, certain personal property was attached. On October 16, 1909, a petition in bankruptcy was filed, alleging that the debtor had given a preference "by permitting the judgment and not removing it before it had rested long enough to have become perfected into a lien which would be valid as against the trustee after adjudication."

In deciding the last cited case, Platt, District Judge, said:

> "In the first place, I am not satisfied that is appears by the petition that any 'sale or final disposition' of the property attached had been arranged for at the time the petition was brought. The preference, therefore, had not gotten into such a situation that it was the duty of Windt, under the subdivision invoked, to vacate or discharge it, and of course he could not commit the act of bankruptcy until such a situation actually existed. Indeed, the petitioners admit that there was not to be any sale, and as to 'final disposition' there was not such a state of things as, in my opinion, the Congress intended to cover by the language of said subdivision."

(See page 586.)

A consummation of the act of bankruptcy under section 3 of the Bankruptcy Act of 1898 is not the date of an actual sale of the bankrupt's property under an execution, but the act of bankruptcy is completed five days before the day of such sale, if at that time the bankrupt fails to dissolve the levy.

In re National Hotel & Cafe Co. (District Court of Eastern District of Pa.), 138 Fed. Rep., 947.

A petition in bankruptcy which alleges, among other things, that an attachment has been made in a legal proceeding and levied on the debtor's property, without any allegation as to the disposition thereof, is insufficient.

In re Vetterman (District Court of New Hampshire), 135 Fed. Rep., 443.

In re Seaboard Steel Casting Co. (D. C.), 124 Fed. Rep., 75. (See p. 76.)

When a respondent's conduct is considerably analogous to some of the statutory acts of bankruptcy, but is not fairly covered by any statutory definition, such a respondent will not be adjudged a bankrupt.

In re Baker-Ricketson Co. (District Court of Mass.), 97 Fed. Rep., 489. (See page 493.)

In re Truitt, 203 Fed., 550. In this action Judge Rose of the District Court of Maryland most carefully considers and weighs the arguments on each side of this question and reaches the conclusion (557):

"The courts may not change what Congress did on the theory that the general purpose of Congress will be more nearly carried out by construing the act to mean something which Congress was unwilling to say. Under the act of 1867 the courts were asked to put a rather strained interpretation upon some of its lan-

guage in order to carry out the supposed intent of Congress to secure equality of distribution in all cases of insolvency. The Supreme Court did not see its way clear to comply with this request. (*Wilson vs. City Bank, supra.*) In that case the court declared that, before any one may be adjudicated an involuntary bankrupt, the precise circumstances or facts in which this is authorized to be done should not only be well defined in the law but clearly established in the court. This general rule of law Congress may well be supposed to have had in mind when it passed the present act. It had a right to assume that the courts would not by construction hold things to be acts of bankruptcy which it had not been willing clearly to declare to be such."

Moreover not only would the answering of the second question propounded by the certificate in the affirmative be an enlargement by the courts of the acts of bankruptcy unwarranted by the act itself, but the new act of bankruptcy thus created by the court would, as we submit, be wholly subversive of a just interpretation of the act. Debtors have some rights as well as creditors.

The contention that the failure of an insolvent judgment debtor, for the period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition" of the property affected by such levy, under the provisions of Sec. 3a (3) of the Bankruptcy Act of 1898, we respectfully submit, does violence to the cardinal rules of statutory construction, and is an attempt to give such section a strained construction to meet a contingency neither provided for in the act, nor in the contemplation of Congress when it passed such act.

Where Congress makes a plain provision, without making any exception, the courts can make none.

French vs. Spencer, 21 How., 228.

Yturbide vs. United States, 22 How., 290.

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction.

Thornley vs. United States, 113 U. S., 310.
Poor vs. Considine, 6 Wall., 458.

It is needless to remind the court that there are numerous judgments obtained every year which become liens upon real estate where the judgment debtor is solvent. Yet if he failed to discharge these judgments within four months, he is, under this construction of the act, liable to have a petition in bankruptcy filed against him and be compelled to appear in the Federal District Court and bring his books and papers to establish his solvency.

There are numerous solvent business men whose credit would be destroyed and who would be practically ruined by the mere filing against them of a petition in bankruptcy. Is it reasonable to suppose that the Congress had in mind that the bankruptcy law could and would be thus used, and is a construction of the law a reasonable one which would permit such an abuse?

Is that construction of the Bankruptcy Act to be adopted which will in effect say to every judgment debtor whose real estate is bound by the lien of the judgment that if he takes his case to an Appellate Court it will be probably more than four months before it will be decided and he must run the risk of having a petition in bankruptcy filed against him?

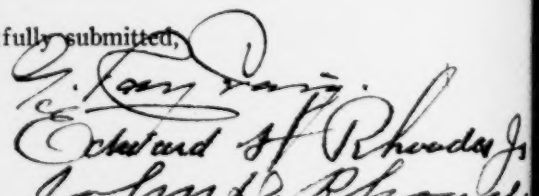
Furthermore, how is an insolvent debtor whose real estate is subject to a judgment lien to vacate or discharge this lien? Should he pay the judgment he would commit an act of bankruptcy. Is he then compelled to file a voluntary petition in bankruptcy? Is the only way to avoid one act of bankruptcy to commit another one? This anomalous situation is well set forth in the *per curiam* in the Circuit Court of Appeals in this case, 202 Fed., 892.

> "If * * an execution is issued and levied on the property of an insolvent person and the indebtedness is admitted or established, there is, outside of the bankruptcy law, no possible way for the debtor to 'vacate or discharge the levy, except by payment, and he is, although hopeful for the future, wholly unable at present to pay, and he can not in any way vacate the levy, except by filing a voluntary petition in bankruptcy. In other words, only by filing the voluntary petition and committing an act of bankruptcy can he avoid becoming subject to adjudication as a bankrupt under this section; or, in still other words, the only way to avoid committing an act of bankruptcy is to commit one."

We are unable to convince ourselves that Congress ever intended to enact, or did enact, any act so grossly unjust to the debtor class, and we submit that the courts will not thus enlarge by implication on the acts of bankruptcy set forth in the act.

We therefore respectfully submit that this court should answer in the negative each of the questions of law certified to it in this case.

Respectfully submitted,



Attorneys for Citizens Banking Company.

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In the Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,
Appellant,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO,
and CORA M. CURTISS,
Appellees.

BRIEF AND ARGUMENT FOR APPELLEES, RAVENNA NATIONAL BANK and CORA M. CURTISS.

By
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STATEMENT.

As shown on pages 1 and 2 of brief for appellant, judgment was obtained and levy made on the bankrupt's property on April 9, 1908. The Petition in Bankruptcy was filed August 10, 1908. The day before that, August 9th, the last day of the four months, was Sunday, and therefore, excluded. Hence, the petition was filed within four months from the act of bankruptcy.

Sec. 31, Bankruptcy Act of 1898, Ohio Statutes, Secs. 10216-7.

As further shown and admitted on pages 1 and 2 of said brief, the petition against the bankrupt was sufficient on all points not arising under the two questions certified. There is, in this Court, therefore, but

One Proposition Involved.

The two questions submitted by the Circuit Court of Appeals under the facts really cover one proposition which we state affirmatively as follows:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property," affected by the levy, under the provisions of section 3a (3) of the Bankruptcy Act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under said section 3a (3), and it is not essential that the debtor shall do anything at all.

It is assumed in this statement that the judgment debtor, being insolvent, the levy constitutes a lien and works a preference. The circuit statement as copied in appellant's brief justifies this assumption.

Authorities.

In support of the proposition above stated, the following authorities, exactly in point, are cited.

> Wilson vs. Nelson, 183 U. S., 191. Certificate from the Circuit Court of Appeals for the Seventh Circuit. No. 31. Submitted April 22, 1901. Decided December 9, 1901.

When a debtor, years before the filing of a petition in bankruptcy, gives to a creditor an irrevocable power of attorney to confess judgment after maturity upon a promissory note of the debtor; and the creditor, within four months before the filing of the petition in bankruptcy against the debtor, obtains such a judgment and execution thereon; and the debtor fails, at least five days before a sale on the execution, to vacate or discharge the

judgment, or to file a voluntary petition in bankruptcy; the judgment and execution are a preference "suffered or permitted" by the debtor, within the meaning of the bankruptcy act of July 1, 1898, c. 541, 3 cl. 3, and the debtor's failure to vacate or discharge the preference so obtained is an act of bankruptcy under that act.

On page 198, Mr. Justice Gray, in the opinion, says:

> "In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than the other creditors; and the lien obtained by which, in a proceeding begun within four months, would be dissolved by the adjudication in bankruptcy, because 'its existence and enforcement will work a preference.' And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate."

Bogen & Trummel v. Protter.

Circuit Court of Appeals, Sixth Circuit. May 4, 1904.

No. 1,266.

I. Bankruptcy—Acts of Bankruptcy—Suffering Preference Through Legal Proceedings.

A debtor who does not pay a lawful debt when due, upon which a creditor obtains a judgment against him and levies on his property "suffers and permits" the creditor to obtain a preference, through legal proceedings

within the meaning of Bankr. Act July 1, 1898, c. 541, §3, subd. 3, cl. "a", 30 Stat. 546, 547 (U. S. Comp. St. 1901, p. 3422), which, if he is insolvent, and unless he discharges the preference at least five days before the time for the sale under the levy, constitutes an act of bankruptcy.

129 Federal, 533.

Folger v. Putnam, 194 Federal 793 (28 A. B. R. 173).

In re Folger.

U. S. Circuit Court of Appeals for the Ninth Circuit, March, 1912. Act of Bankruptcy—Preference through Legal Proceedings—What Constitutes.

A preference may consist not only in bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference.

Same: Failure to Vacate Attachment Lien.

Although the mere suffering or permitting, while insolvent, a creditor to obtain a preference, alone does not constitute an act of bankruptcy under section 3a (3) of the Bankruptcy Act, but the debtor must have failed at least five days before a sale or final disposition of the property to have vacated or discharged such preference, it is incumbent upon an insolvent person to discharge or vacate a lien, secured by an attachment upon his property, at least 5 days before a period of four months expires following the date of the levy of such attachment, and if he fails to do so he commits an act of bankruptcy.

Wolverton, District Judge:

In the opinion, page 181, says that final disposition within the operation of the law is effected when the lien becomes irrevocable unalterably incumbering the property of the bankrupt.

He further says:

> "We hold, therefore, that it is incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails therein he commits the third act of bankruptcy. It may be and has been suggested that this will sometimes force a person into bankruptcy, when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose. Of course, unless the person against whom the attachment is secured is insolvent, the conclusion reached cannot apply."
>
> 194 Federal, 793.

The case, In Re Tupper, decided July 17th, 1908, in the District Court, for the Northern District of New York, 163 Fed., 766, is exactly like the case at bar in the essential facts. The 4th and 5th Syllabi of this case are in the following language:

> "4. 'Preference – Transfer.'
>
> Bankr. Act, July 1, 1898, c. 541, Sec. 60, 30, Stat. 562 (U. S. Comp. St. 1901, p. 3445), declares that a person shall be deemed to have given a 'preference,' if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, the effect of which will be to enable one

creditor to obtain a greater percentage of his debt than other creditors of the same class. Section 1, subd. 25, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), declares that a 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift, or security. Section 3, subd. 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that a person shall commit an act of bankruptcy if he has suffered or permitted any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same. Held, that where a debtor, while insolvent, permitted certain creditors to recover and docket a judgment against her in the county, in which she had an equity in real estate, and such judgment was permitted to remain a lien until one day before the expiration of four months from the date it was so docketed, and on the expiration of such time it would have become an absolute security for the debt, it constituted a preference and an available act of bankruptcy.

5. 'Final Disposition.'

Bankr. Act, July 1, 1898, Sec. 3, subd. 3, c. 541, 30 Stat., 546 (U. S. Comp. St. 1901, p. 3422), provides that a person shall have committed an act of bankruptcy by having suffered or permitted, while insolvent, any creditor to obtain a preference by legal proceeding and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged it. Held, that the term 'final disposition,' as so used, did not mean a gift of the property to some third person or a voluntary transfer to the creditors in satisfaction of a preferential judgment, but included every other method than that specified of passing the control and dominion of the property of the insolvent debtor to another or others either absolutely or as security to the preferred creditor to the exclusion of his other creditors."

Ray, District Judge, in the opinion at page 770, uses this language:

> "It seems to me that effect is to be given to the words 'or final disposition of any property affected by such preference.' 'Final disposition' is not a gift of the property to some third person or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. Congress had in mind, when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others either absolutely or as security to the preferred creditor to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the bankruptcy act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that an advertised or even a proposed sale is not in all cases necessary under subdivision 3 of section 3. In re Harper (D. C.), 105 Fed., 900, 5 Am. Bankr. Rep., 567; In re Miller, et al. (D. C.), 5 Am. Bankr. Rep., 140, 104 Fed., 764; Scheuer vs. Smith & Montgomery Book, etc., Co., 7 Am. Bankr. Rep., 384, 112 Fed., 407, 50 C. C. A., 312."

Matter of McCartney, 26 Am. B. R., 548. U. S. District Court, Middle District of Pennsylvania, July, 1911. Acts of Bankruptcy—Permitting Preference Through Legal Proceedings.

Evidence given upon the hearing of a petition in involuntary bankruptcy held sufficient to sustain a finding that the alleged bankrupt was insolvent at a time when he permitted his wife and another creditor to secure judgment against him and to levy upon his property, and that he had committed an act of bankruptcy under section 3a (3) of the Bankrutpcy Act.

The bankrupt claimed he was not insolvent at the time the judgment became a lien, but in the opinion, page 550, Witmer, District Judge, says:

> "The testimony is, however, otherwise convincing that the aggregate of the property of the alleged bankrupt is at a fair valuation not sufficient in amount to pay his just debts. W. J. McCartney is unquestionably insolvent and unable to pay his lawful debts, and having stood by while his creditors secured judgment against him and levied upon his property, suffering and permitting such judgment to be taken and such levy to be made, has committed an act of bankruptcy under paragraph 3a, section 3, chapter 3 of the Bankruptcy Act of 1898 and its supplements."

CONCLUSION.

The foregoing authorities applied to the admitted facts in the case at bar clearly establish the following points:

1. That the judgment levied on the property of Cora M. Curtiss on April 9, 1908, created a lien thereon in favor of the Citizens Bank of Norwalk, the judgment creditor, the judgment debtor being then insolvent.

2. This lien existed for a period one day less than four months, to-wit, until August 10, 1908, when the petition in involuntary bankruptcy was filed by the Ravenna National Bank, being so filed within four months, as August 9th was Sunday, these facts constituting a "final dispostion" of said property by the bankrupt to the extent of the judgment.

3. To establish the bankruptcy through the foregoing facts it was not necessary for Cora M. Curtiss to do anything.

Her act of bankruptcy was therefore complete in all respects when the involuntary petition was filed and the adjudication by the District Judge was fully authorized:

I. She permitted the judgment.

II. She was then insolvent.

III. The judgment worked a preference.

IV. She did nothing to vacate it.

V. Except in bankruptcy the judgment was unassailable.

VI. The involuntary petition alone prevented the consummation of the preference and the defeat of the main purpose of the bankruptcy law in securing an equal distribution among all creditors of the property of insolvent persons.

Respectfully submitted,

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Attorney for the Ravenna National
Bank and Cora M. Curtiss.